89-1960

No. _____

In The

Supreme Court of the United States

October Term 1989

EDWARD A. McCONWELL, and
CLAYTON E. DICKEY,

Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the imposition of Rule 11 sanctions should be reviewed under a "three-tiered" analysis or under an "abuse of discretion" standard.

2. Whether attorneys may be sanctioned under Rule 11 for filing their client's affidavit which the attorneys did not sign in light of this Court's recent decision in *Pavelic & LeFlore v. Marvel Entertainment Group,* 110 S.Ct. 456 (1990).

3. Whether the Due Process Clause requires an evidentiary hearing prior to the imposition of sanctions when material facts are in dispute.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption to the Petition, Security Software of New Jersey, Inc., Security Software of Marlton, Inc., Peter Faltings and James Corcoran were plaintiffs in the District Court. Sanctions were imposed jointly against McConwell, Dickey and Corcoran.

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Petitioners Edward A. McConwell and Clayton E. Dickey pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the opinion and judgment of that court in *McConwell et al. v. International Business Machines.*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and set forth in Appendix at 1a. The ruling of the United States District Court

for the Eastern District of Virginia granting sanctions is unreported and set forth in the Appendix at 14a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1990. A timely Petition for Rehearing *in banc* was denied on March 13, 1990, and the court's order is attached in the Appendix at 33a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This Petition is filed within 90 days of the denial of the Petition for Rehearing and is timely under Rules 13.1 and 13.4 of the Rules of this Court effective January 1, 1990.

STATUTORY PROVISION INVOLVED

Sanctions were imposed against the Petitioners McConwell and Dickey pursuant to Rule 11 of the Federal Rules of Civil Procedure which provides:

> "Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature

of any attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (As amended Apr. 18, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

STATEMENT OF THE CASE

Petitioners filed a Complaint in October, 1986, on behalf of two Entre Computer Center franchisees against IBM alleging numerous counts of commercial fraud. After denial of preliminary motions, the District Court on December 31, 1986, entered its standard pretrial order. (J.A. at 11)[1] All discovery was to be completed by March 13,

[1] References to "J.A." are references to the Joint Appendix filed before the Fourth Circuit below.

1987, with all motions to be noticed for hearing on the closest Friday prior to the Thursday, March 19, pretrial conference. (*Id.*)

Discovery was undertaken promptly and with diligence. A total of 19 depositions were taken by the plaintiffs and four were taken by the defendant. In order to meet the time limits of the pretrial order, several depositions were taken on a "double track" with two simultaneous separate depositions.

IBM took the deposition of James Corcoran, one of the plaintiffs, in four separate sessions beginning on February 2, 1987, and concluding in an all day session in New York City on March 11, 1987. The deposition transcript totals 908 pages. The sanctions rest in this case on six alleged inconsistencies between the March 11 testimony and a contemporaneous affidavit submitted in opposition to IBM's Motion for Summary Judgment.

On March 2, 1987, IBM filed a summary judgment motion just outside the ten-day-notice requirement of the local rules and the pretrial order. The timing of the motion presented Petitioners with a significant practical problem. Petitioner McConwell was a sole practitioner with an office in Overland Park, Kansas and two associates; IBM is represented by Cravath, Swaine and Moore with more than 250 attorneys in its New York office. The parties were taking "double track" depositions in New York City during the week of March 9. Plaintiff's counsel thus had to respond to the summary judgment motion and simultaneously take multiple depositions. The difficulty was met by having the more senior associate, Petitioner Dickey, stay in Kansas City to respond to the

motion, having the sole partner take the deposition of a key defense witness, and having the junior associate who had been admitted to practice a few months earlier defend the deposition of Mr. Corcoran.

Petitioner Dickey prepared the opposition to IBM's motion. He drafted an affidavit for Mr. Corcoran's signature based on his prior discussions with Mr. Corcoran and his prior representation of these and other Entre franchisees in a number of related suits. *See, e.g., Entre Computer Centers, Inc. v. FMG of Kansas City, Inc.*, 819 F.2d 1279 (4th Cir. 1987); *Faltings v. IBM*, No. 87-1123 (4th Cir. Aug. 4, 1988) (unpublished). (J.A. at 107, 196) A draft of the affidavit was completed in the afternoon of Monday, March 9, 1987. (J.A. at 107) Dickey was in Kansas City, Mr. Corcoran was at various times either in New York or in New Jersey, and it was imperative that the affidavit be filed not later than Wednesday afternoon. (J.A. at 196-97) Dickey therefore telecopied the draft to Mr. Corcoran and reviewed it with him in a telephone conversation Monday afternoon. (J.A. at 107)

Dickey was not able to obtain Mr. Corcoran's signature on the affidavit before the time he felt he had to serve and file it. The exhibit version instead used the notation "/s/" with Mr. Corcoran's typed name on the signature line. (J.A. at 16) Dickey did not realize at that time that the "/s/" might be construed as an indication that a signed copy of the affidavit was then in existence, rather than signifying Mr. Corcoran had reviewed, approved and was expected to sign the draft. (*Id.* at 197-98)

On the morning of March 11, 1987, in New York City prior to the start of Mr. Corcoran's deposition, Mark

Kelly, the junior associate of McConwell, gave a complete set of plaintiffs' summary judgment papers to David Sternberg, an associate attorney at Cravath who was assigned to this case. Mr. Kelly informed Mr. Sternberg at that time that the Corcoran affidavit had not yet been executed, but would be signed as soon as possible. (J.A. at 190)

Mr. Kelly proceeded to attend Mr. Corcoran's deposition. It is apparent from the transcript that in the afternoon of that deposition, IBM's counsel – an experienced senior litigation partner – skillfully examined Mr. Corcoran based, in part, on the unexecuted affidavit. Weaving questions drawn from the affidavit into questions drawn from other sources, IBM's counsel effectively cross-examined the affidavit without either Mr. Corcoran or Mr. Kelly recognizing what was happening. In the process counsel extracted a few arguably inconsistent statements. Mr. Kelly, who had been admitted to practice only a few months earlier and had not previously handled a significant deposition, did not request IBM's counsel to use a copy of the draft affidavit to refresh Corcoran's recollection or cross-examine him, even after Corcoran testified that "without it in front of me, I will be really pressed to think of what it was" that he read. (J.A. at 54, 257-58) (Corcoran deposition and proffer of evidence in support of appellants' Motion for a New Trial)

After concluding the questioning on the substantive matters contained in the affidavit, IBM's counsel then inquired about the preparation of the affidavit itself. For reasons not fully explored below, Mr. Corcoran was, in our view, evasive. Despite the fact that he had reviewed a telecopied draft two days earlier, had requested a few

changes and in fact had the telecopied draft with him in the deposition room, he responded to some of the questions in a manner that may have suggested that he had not even seen the draft. While he acknowledged its existence, he characterized the draft as "a very difficult thing to read" that was not in "studyable condition." (J.A. at 52, 105, 257) (corrected Corcoran deposition; proffer of evidence). In interviews Mr. Corcoran and Mr. Faltings described the appearance of the draft slightly differently, but both agreed that it was "readable." (J.A. 257) (proffer)

The next morning McConwell told Mr. Corcoran "to review his affidavit . . . in detail to assure that it was accurate and correct [and] if the affidavit was accurate and correct . . . to sign it." (J.A. at 263) Mr. Corcoran read through his affidavit to insure that the changes he had requested had been made. (J.A. at 110-11, 191) Mr. Corcoran then personally assured Mr. McConwell that the affidavit was "OK." (J.A. at 263) Mr. Kelly gave Mr. Sternberg a copy of the executed affidavit that same morning. (J.A. at 191) Several hours later IBM submitted a reply memo on the summary judgment motion which characterized the affidavit as "a fabrication" and a "fraud upon th[e] Court". (J.A. at 61, 62)

In charging that counsel had submitted a sham affidavit, IBM apparently believed that Corcoran had in fact not reviewed the draft with any care or attention, and may not even have seen a draft. That mistaken impression, formed in haste in the closing hours of discovery on the basis of Corcoran's late afternoon testimony, set the stage for all subsequent activity on the sanctions issue.

McConwell reviewed IBM's reply memo during the evening of Thursday, March 12, in preparation for his summary judgment argument the next morning. He did not have a transcript of the Corcoran deposition, but only had IBM's selective excerpts from the transcript, one of which contained a significant transcription error. (J.A. at 263-64, 105) McConwell was briefed on what had happened at the deposition by Messrs. Kelly, Corcoran and coplaintiff Peter Faltings. (J.A. at 258, 264) (McConwell affidavit; proffer of evidence) McConwell was advised that IBM's quotations were taken out of context and there were no inconsistencies between the deposition and the affidavit. (*Id.*) Before the executed affidavit was filed, McConwell was assured by Mr. Corcoran that the affidavit was true. (*Id.*)

The next day at the oral argument, IBM's counsel referred only briefly to the Corcoran affidavit in his opening remarks, stating that the affidavit could not be relied upon by the court, apparently because he still believed it had never been executed. (J.A. at 65) When McConwell told the district court that the executed affidavit had been filed, IBM's counsel replied that he was "frankly very surprised, astonished to hear that Mr. Corcoran could have signed his affidavit [after his deposition]". (J.A. at 68) Apparently Mr. Sternberg had not told Mr. Saunders that Mr. Corcoran had executed the affidavit. Absent such a breakdown in communications, it is difficult to understand how IBM could, in good faith, have filed their memorandum and argued their position based on the absence of any signed affidavit. In any event, the dispute did not appear to be a significant issue after McConwell

explained the circumstances to the district court. (J.A. at 66-67)[2]

About a month later allegations of inconsistency were again raised by IBM. McConwell had filed a Motion to Modify the court's summary judgment ruling. Aware of the allegations regarding the Corcoran affidavit, McConwell drafted his motion with a conscious desire to avoid any reliance on the Corcoran affidavit. (J.A. at 193) He recognized that a page from the opposition to IBM's summary judgment motion had been missing, so he referred to and attached the missing page to his motion to modify. (*Id.*) McConwell did not realize that a footnote on that missing page – a pleading he had not personally prepared – referred to the Corcoran affidavit. (J.A. at 194)

IBM's written response to the Motion to Modify mentioned "the false 'Affidavit of James C. [sic] Corcoran.' " (J.A. at 86) The weight of IBM's written response went to the merits of the motion; the Corcoran affidavit was referred to only in passing.

At oral argument, IBM's counsel departed from the written submission and began his remarks with a diversionary attack based on the Corcoran affidavit which he characterized as having "come back" before the court. Acknowledging that the affidavit was irrelevant to the merits of the Motion to Modify, IBM's counsel went on with his argument. (J.A. at 89) The District Court noted

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[2] The District Court suggested that McConwell obtain and review a copy of the deposition transcript, but did not intimate that sanctions were contemplated. (J.A. at 67)

that "it looks like the deposition contradicted the affidavit," but went on to reverse its prior decision and grant McConwell's motion in significant part. (J.A. at 92, 94) Again the issue of the allegedly "false affidavit" was raised by IBM but not resolved; again the issue seemed to have gone away.

The issue was not raised again until after the jury returned a verdict in IBM's favor and plaintiffs noted their appeal on June 19. On July 8 IBM's counsel wrote the trial judge, stating that the court had taken the issue of the false affidavit "under advisement" during the trial (J.A. at 100) That letter did not contain any motion for sanctions. Indeed IBM has never filed a motion for sanctions. Nonetheless, on July 13 the trial judge issued an order that a hearing would be held on "IBM's Motion [sic] for Sanctions Against the Plaintiffs for Filing a False Affidavit." (J.A. at 102) The hearing was scheduled for the regular Friday motions calendar, not set specially.

Appellants filed a memorandum and supporting exhibits in opposition to the non-existent motion for sanctions. IBM replied and a motions hearing was held on September 11, 1987. At that time the trial judge announced that he was tentatively inclined to impose sanctions, but would reserve final judgment until he had reviewed the record. (J.A. at 153)

On October 23, 1987, Petitioners through their own separate, newly-retained counsel filed a Motion for an Order Denying Sanctions or, in the Alternative, for an Evidentiary Hearing. In that pleading Petitioners argued that the affidavit and deposition were not inconsistent to

the extent necessary to impose sanctions. Petitioners argued further that if the court continued to believe there was inconsistency sufficient to warrant sanctions, the Due Process Clause required an evidentiary hearing to determine whether it was the affidavit or the deposition that was false. That motion was heard and denied on November 6, 1987. (J.A. at 8) More than three months later the trial judge issued his opinion and imposed sanctions against Mr. Corcoran, McConwell and Dickey. (J.A. at 234)

The district court, while concluding that the sanctions imposed here were proper, also said that this is "a good test case." (J.A. at 178) The sanctions were imposed more than nine months after the appeal from a final judgment because the district court believed that Mr. Corcoran made irreconcilably inconsistent statements in his deposition and a contemporaneous affidavit. The district court refused to hold an evidentiary hearing regarding the alleged inconsistencies and concluded without having heard any evidence that it was the affidavit – not the deposition – that was false. Based on that finding the district court imposed sanctions on counsel under Rule 11 of the Federal Rules of Civil Procedure and the "inherent power of the court".

Petitioners filed a timely appeal to the Fourth Circuit. Petitioners presented to the Fourth Circuit the arguments advanced herein. On January 30, 1990, the Fourth Circuit issued its opinion affirming the imposition of sanctions but reversing in part the district court's monetary award with instructions to reassess the amount consistent with the Fourth Circuit's views.

In that portion of its opinion affirming the sanctions the Fourth Circuit implicitly rejected the application of the "three-tiered" standard of review utilized by other Courts of Appeals and suggested by Petitioners. Moreover, the Fourth Circuit implicitly concluded that Petitioners could properly be sanctioned for the filing of papers they did not sign. Finally, the Fourth Circuit implicitly concluded that Petitioners were not entitled under the Due Process Clause to an evidentiary hearing.

Petitioners again raised these same issues presented here in their Petition for Rehearing. In that Petition Petitioners specifically informed the Fourth Circuit of this Court's recent decision in *Pavelic & LeFlore v. Marvel Entertainment Group,* 110 U.S. 456 (1990) which directly bears on Petitioners' argument that they cannot be sanctioned for filing documents they did not sign. Additionally, Petitioners informed the Fourth Circuit that this Court had granted certiorari in *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890 C.D.C. Cir. 1989), *cert. granted sub nom. Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 58 U.S.L.W. 3258 (1989), in which one of the questions presented is essentially the same as the first question we present herein.

I. THE IMPOSITION OF RULE 11 SANCTIONS SHOULD BE REVIEWED UNDER A "THREE-TIERED" ANALYSIS

On February 20, 1990, this Court heard argument to review the case of *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890 (D.C. Cir. 1989), *cert. granted sub nom. Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 58 U.S.L.W. 3258 (1989). One

of the questions briefed and argued before the Court was whether review of Rule 11 sanctions under an "abuse of discretion" standard is appropriate. Petitioners respectfully submit, as we did before the Fourth Circuit, that review under that standard is inappropriate. Moreover, Petitioners respectfully submit that this Court's resolution of the appropriate standards issue in *Cooter & Gell* will most likely control the issue as it is framed in this case. If the Court chooses not to decide the issue in *Cooter & Gell* Petitioners respectfully urge the Court to resolve it through this case.

Petitioners believe that in the instant case the Fourth Circuit should have reviewed the district court's finding of "inconsistency" between the deposition testimony and the affidavit under the *de novo* standard and not the "abuse of discretion" standard. Support for this view is found in the decisions of some of the lower appellate courts.

The Ninth Circuit has taken the lead in developing a three-tiered standard. *See Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). The three-tiered standard consists of reviewing: (1) factual determinations under the clearly erroneous standard; (2) the legal conclusion that the facts constitute a violation of Rule 11 under the *de novo* standard; and (3) the appropriateness of the sanction imposed under the "abuse of discretion" standard. *See also, Business Guides v. Chromatic Com. Enterprises*, 892 F.2d 802, 807 (9th Cir. 1989); *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986). The Eighth Circuit likewise applies the three-tiered standard of review. *See EEOC v. Milavetz & Assocs., P.A.*, 863 F.2d 613, 614 (8th Cir. 1988).

The decisions of the Fourth Circuit have been inconsistent. In *United Food & Commercial Wkrs. v. Marval Poultry*, 876 F.2d 346, 350-351 (4th Cir. 1989), the Court expressly followed the Ninth Circuit's approach:

> In general it is said – and accurately for the run of cases – that the decision whether and in what amount to award attorney fees is one committed to the award court's discretion, subject only to review for "abuse" of that discretion. As indicated, that is generally accurate, but only generally. While the ultimate decision to award or deny attorney fees typically has at least a large discretionary component, it may be revealed upon inspection that such a decision actually turned on an express or implicit finding of fact or conclusion of law that dictated the ultimate result. In the more typical case, the ultimate decision will be an amalgam – an exercise of discretion based upon explicit or implicit findings of fact and conclusions of law about the availability and scope of discretion. Review may correspondingly be an amalgam, depending upon the claims of error. If the claim is of error in underlying factfindings which infected the ultimate decision, review must proceed under the clearly erroneous standard; if of error of law infecting the ultimate decision, under the *de novo* review standard. Only if the claim of error goes exclusively to the impropriety of an ultimate exercise of available discretion is review solely under the abuse of discretion standard. *Cf. Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986) (Rule 11 sanction order may be based on composite of factfindings, legal rulings, and discretion, hence reviewable accordingly).

The Fourth Circuit's decision in *United Food* is in direct conflict with previous Fourth Circuit decisions

applying the "abuse of discretion" standard. "[A] district court's imposition of Rule 11 sanctions is ordinarily entitled to deference by this Court and may not be disturbed except for abuse of discretion." [Citations omitted.] *Stevens v. Lawyers Mut. Liab. Ins. Co. of N.C.*, 789 F.2d 1056, 1060 (4th Cir. 1986); *See also, Fahrenz v. Meadow Farm Partnership*, 850 F.2d 207 (4th Cir. 1988); *Cleveland Demolition Co., Inc. v. Azcon Scrap Corp.*, 827 F.2d 984, 987 (4th Cir. 1987).

The Fourth Circuit panel which decided the instant case addresses this question only briefly. The opinion states only that the sanctions decision of the district court "is entitled to deference by a reviewing court and will only be overturned upon a finding of abuse of discretion". (App. 9, citing *Stevens, supra.*)

If the three-tiered standard employed by the Eighth and Ninth Circuits and – on one occasion – by the Fourth Circuit represents one end of the spectrum then the other end of the spectrum is represented by those circuit courts employing the "abuse of discretion" standard alone. *See Olsen v. United Parcel Service*, 892 F.2d 1290, 1297-1298 (7th Cir. 1990); *Kraemer v. Grant County*, 892 F.2d 686, 689 (7th Cir. 1990);[3] *Mars Steel Corp. v. Continental Bank, N.A.*, 880

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[3] The Seventh Circuit's decision in *Kraemer* demonstrates that the so-called "abuse of discretion" standard is a bit of a misnomer in Rule 11 cases. "But deferential review is different from no review at all, even when there is no controlling legal issue in the case. [Citation omitted.] 'Concerns for the effect on both an attorney's reputation and for the vigor and creativity of advocacy by other members of the bar necessarily require that we exercise less than total deference for the district court in its decision to impose Rule 11 sanctions.' [Citations omitted.] In reviewing the imposition of sanctions under Rule 11,

(Continued on following page)

F.2d 928, 930 (7th Cir. 1989) (en banc); *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 758 (1st Cir. 1988); *Monument Builders v. Amer. Cemetery Ass'n*, 891 F.2d 1473, 1484 (10th Cir. 1989); *Lemaster v. United States*, 891 F.2d 115, 118 (6th Cir. 1989); *Sheets v. Yamaha Motors Corp., U.S.A.*, 891 F.2d 533, 535 (5th Cir. 1990); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 872 (5th Cir. 1988) (en banc); *Schering Corp. v. Vitarine Pharmaceuticals, Inc.*, 889 F.2d 490, 496 (3rd Cir. 1989).[4]

Other circuit courts employ a standard which falls in the middle of the spectrum, i.e., the "abuse of discretion" standard is generally applied with issues of law reviewed *de novo*. *See International Brotherhood of Teamsters (Airline Div.) v. Ass'n of Flight Attendants*, 864 F.2d 173, 176 (D.C. Cir. 1988); *DeSisto College, Inc. v. Line*, 888 F.2d 755, 763 (11th Cir. 1989), *cert. denied*, ___ S.Ct.___ (1990); *Thomas v. Evans*, 880 F.2d 1235, 1239 (11th Cir. 1989) ("[F]actual determinations and the decision to impose sanctions are within the discretion of the district court and are subject to review only for abuse of discretion. [Citation omitted.] Determining whether a pleading or motion is legally sufficient, on the other hand, involves a question of law

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then, we will give deference to the decision of the District Court, but with careful reference to the standards governing the exercise of the court's discretion and to the purpose Rule 11 is meant to serve." *Id.*

[4] The Third Circuit's decision in *Schering, supra*, appears to conflict with its earlier decision in *Snow Machines, Inc. v. Headco, Inc.*, 838 F.2d 718, 724-725 (3rd Cir. 1988).

subject to *de novo* review"); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254, n.7 (2nd Cir. 1985). *See also, Montgomery v. Jimmy's Tire & Auto Ctr.*, 566 F.2d 1025, 1028-1029 (D.C. App. 1989).

The Fourth Circuit's failure to review this case under any standard other than the rigid "abuse of discretion" standard and in a manner consistent with its own decision in *United Foods, supra*, is of controlling significance in this case. The validity of the trial court's finding of inconsistency lies near the heart of this Petition. The sanctions in this case were based on the district court's finding that "it [is] impossible to reconcile the Corcoran affidavit and deposition testimony." (J.A. at 237) If that finding is wrong, then the basis for sanctions disappears. Petitioners submit that the Fourth Circuit should have reviewed that finding under the *de novo* standard but that, regardless of the standard of review, the finding must be set aside.

The "abuse of discretion" standard should not apply where the issue raised is one of law rather than a challenge to the exercise of the trial court's discretion. Petitioners submit that in the instant case, as a matter of law, the affidavit and deposition are not irreconcilably inconsistent to the extent necessary to impose sanctions.

The issue of "irreconcilable inconsistency" is functionally equivalent to the issue of whether a particular pleading is "frivolous", an issue presented in other Rule 11 cases. Decision of both issues requires only an examination of the documents in the record and application of legal standards. Neither decision requires exercise of discretionary functions committed to the trial judge. Because

the determination of inconsistency in this case rests entirely on a comparison of the documents and not on any issues of credibility, demeanor or evidence considered by the trial court, the Fourth Circuit should not have been bound by the district court's finding and should have made its own determination.

Petitioners advanced these arguments to the Fourth Circuit in their papers and at oral argument. Petitioners argued that the district court's conclusion that Corcoran's affidavit and deposition were "inconsistent" was plainly wrong as a matter of law and that the *de novo* standard of appellate review was required. At oral argument at least one member of the panel seemed to agree when he stated that he had reviewed the affidavit and deposition testimony and did not see any irreconcilable inconsistency. In fact he expressly told IBM's counsel during the argument that IBM's contention of inconsistency was "pettifoggery." The panel opinion does not explain how that perception led to a *per curiam* affirmance of the imposition of sanctions. The panel opinion addresses the issue only by stating that the sanctions were "based on specific, supportable factual findings." (App. 9)

It seems that the affirmance rested on an application of the "abuse of discretion" standard for appellate review which is the most lenient of all standards and, in the instant case, amounts to no appellate review. Under either a *de novo* or "clearly erroneous" standard, the district court's sanctions should be set aside. Because the wrong standard was used, the case should be re-heard.

II. THE SANCTIONS IMPOSED IN THIS CASE MAY NOT STAND IN LIGHT OF THIS COURT'S RECENT DECISION IN *PAVELIC & LEFLORE V. MARVEL ENTERTAINMENT GROUP*

The Fourth Circuit's opinion rests entirely on its conclusion that there were "irreconcilably inconsistent statements made in [Corcoran's] deposition and contemporaneous affidavit." (App. 3a). The district court imposed sanctions on Corcoran and on his attorneys, the Petitioners herein.

The sanctions against Corcoran were imposed under Rule 56(g) and under the Court's inherent authority. The sanctions against Petitioners were imposed by the district court under Rule 11 and inherent authority. The Fourth Circuit apparently affirmed the sanctions solely in reliance on Rule 11 since the only authority cited by the Fourth Circuit in support of its affirmance was its decision in *Stevens v. Lawyers Mut. Liability Ins. Co.*, 789 F.2d 1056 (4th Cir. 1986), which dealt exclusively with Rule 11.

The affirmance conflicts with the language of Rule 11 and the decision of this Court in *Pavelic & LeFlore, supra.* Rule 11 applies expressly, specifically and solely to a "pleading, motion or other paper . . . signed" by an attorney or party. It is not a general purpose source of authority for disciplining attorneys. In *Pavelic & LeFlore* this Court stated that the text of Rule 11 is to be read literally. In that case sanctions had been awarded against an individual attorney and his law firm. This Court reversed the imposition of sanctions against the firm because only the individual attorney had signed the offending paper.

Speaking for this Court, the Honorable Justice Scalia stated that Rule 11 was to be given its plain and literal meaning. *Pavelic & LeFlore,* 110 S.Ct. at 458. The Rule provides that sanctions are to be imposed on "the person who signed [the offending paper], a represented party, or both." Justice Scalia cited with approval the decision of the Fifth Circuit in *Robinson v. National Cash Register,* 808 F.2d 1119 (5th Cir. 1987). In *Robinson,* the Fifth Circuit reversed sanctions imposed against counsel who had not signed the offensive paper, stating: "We believe that the text of the Rule, the Advisory Committee Note, and the cases decided under Rule 11 make it clear that an attorney must *actually sign* a 'pleading, motion, [or] other paper' in order to have sanctions imposed against him under Rule 11." [Emphasis added] *Id.,* at 1128-29.

The Fourth Circuit's opinion in this action conflicts with its own decision reported in *Kirby v. Allegheny Beverage Corp.,* 811 F.2d 253, 257 (5th Cir. 1987), in which it stated that "Rule 11 provides for sanctions when a pleading is signed in violation of the Rule." In this case neither McConwell nor Dickey signed either the affidavit or the deposition and thus, there is no basis for sanctioning *them* under Rule 11 for inconsistencies in papers they did not sign. The Fourth Circuit's decision fails to explain what paper either of them signed in violation of the Rule. Because Petitioners did not sign the offending papers and because they were not "represented parties" in the action there is simply no basis upon which to sanction these counsel under Rule 11.

III. IN RULE 11 CASES, DUE PROCESS REQUIRES AN EVIDENTIARY HEARING IN CASES WHERE THE COURT MUST FIND DISPUTED FACTS OR RESOLVE ISSUES OF CREDIBILITY

The Fifth Amendment to the United States Constitution prohibits the federal government from depriving citizens of the United States of their life, liberty or property without due process of law. When a federal district court imposes a sanction against an attorney pursuant to Rule 11 of the Federal Rules of Civil Procedure, the sanction typically is in the form of a monetary penalty. This Court recently described such monetary sanctions not as "reimbursement" to the party seeking them but, rather, as "punishment" and as "retribution". *Pavelic & LeFlore, supra,* 110 S.Ct. at 459, 460 (1989). This Court, however, has not yet addressed the question of the extent to which the Due Process Clause of the Fifth Amendment bears upon a District Court's "retribution" under Rule 11.

The Fourth Circuit's opinion in the instant case conflicts with other lower court authorities which have dealt with this question. The Second Circuit has held that although "District Courts generally have wide discretion in deciding when sanctions are appropriate [,] the manner in which [they] are imposed must comport with due process requirements". *Sanko Steamship Co., Ltd. v. Galin,* 835 F.2d 51, 53 (2nd Cir. 1987). The Seventh Circuit has held that "an attorney ordered to pay money as a sanction for the filing of a frivolous suit or appeal is entitled to due process of law, and . . . this entitlement includes an opportunity for a hearing if a factual question [concerning] the propriety of sanctions is raised." *Hill v. Norfolk &*

Western Ry. Co., 814 F.2d 1191, 1201 (7th Cir. 1987). "Undoubtedly, parties facing the possibility of the imposition of Rule 11 sanctions have interests sufficient to qualify them for protection under the Due Process Clause of the Fifth Amendment". [Citations omitted] *Stinson v. American Sterlizer Co.*, 127 F.R.D. 689, 693 (S.D. La. 1989).

In June 1988 the Litigation Section of the Trial Practice Committee of the American Bar Association published its Standards & Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure published at 121 F.R.D. 101. One of the concerns motivating the Committee was the "uneven application of Rule 11 by the Courts . . . " *Id.*, 121 F.R.D. at 104.

> "The Committee's survey of all reported Rule 11 decisions (which now number more than 1,000) confirmed that, on many of the recurring issues, the Court's apply Rule 11 uniformly. The survey also confirmed, however, that on some material issues there are differences among the District Courts and individual judges that can lead to disparate treatment of similarly situated persons." *Id.*

The Committee included in its Standards & Guidelines a section on what procedures should be employed in Rule 11 cases. Citing *Gagliardi v. McWilliams*, 834 F.2d 81, 82-83 (3rd Cir. 1987), the Committee observed that "[d]ue process requires that, before sanctions are imposed, the alleged offender be afforded fair notice and an opportunity to be heard." 121 F.R.D. at 127. With respect to whether the "opportunity to be heard" requires a hearing the Committee stated the following:

> "The Court, in its discretion, shall determine whether to hold a hearing on sanctions under

> consideration. *A hearing is ordinarily required prior to the issuance of any sanction that is based upon a finding of bad faith on the part of the alleged offender.* A hearing is appropriate whenever it would assist the Court in its consideration of the sanctions issue or would significantly assist the alleged offender in the presentation of his or her defense." [emphasis added]

Id., at 128. In support of these statements the Committee cited *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194, 205-06 (7th Cir. 1985); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys.*, 815 F.2d 391, 405 (6th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *Brown v. Nat'l Bd. of Medical Examiners*, 800 F.2d 168, 173 (7th Cir. 1986).

The Eleventh Circuit has observed that "when a Court is asked to resolve an issue of credibility . . . the risk of an erroneous imposition of sanctions under limited procedures and the probable value of additional hearing are likely to be greater." *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987). The Honorable Judge Schwarzer has written that "[a]n evidentiary hearing would not seem to be necessary and should be avoided, *unless the court must find disputed* facts or resolve issues of credibility" [emphasis added]. Schwarzer, *Sanctions Under the New Federal Rule 11 – A Closer Look*, 104 F.R.D. 181, 198 (1985).

In *Andrulonis v. United States*, 724 F.Supp. 1421 (N.D.N.Y. 1989), the Plaintiff sought sanctions against the government based upon its withholding of evidence during discovery. Although the Court had previously precluded the document's introduction into evidence as a sanction pursuant to Rule 37(d) of the Federal Rules of

Civil Procedure it declined to impose sanctions against the attorneys pursuant to Rule 11 in the absence of a hearing notwithstanding the exceedingly detailed factual record. "To resolve this issue, which will require some inquiry into the subjective motivations of agents of the Government and of a Justice Department attorney, it will be necessary to conduct a hearing." *Andrulonis, supra,* 724 F.Supp. at 1537.

In *Hutnick v. Inland Steel Co.,* 1987 U.S. Dist. LEXIS 2462 (N.D. Ill. 1987), an attorney had submitted an affidavit in opposition to a motion to disqualify him that was contradicted by other pleadings. In granting the motion to disqualify, the Court simultaneously ordered "an *evidentiary hearing* to determine whether [counsel] ought to be sanctioned for filing a false affidavit." [Emphasis added.] *Id.,* at 12.

Petitioners do not believe and do not suggest that a hearing should be held in every Rule 11 case. Rather, Petitioners urge the Court to grant certiorari to establish the principle that where a factual dispute is present, the attorney is accused of bad faith or the imposition of sanctions rests in large part upon credibility determinations that the Due Process Clause requires an evidentiary hearing during which the accused attorney is given the opportunity to testify.

The danger inherent in the lack of an evidentiary hearing in such circumstances is illustrated by the events of the instant case. Without ever addressing Petitioners' Due Process arguments, the Fourth Circuit concluded that the district court could have properly rested its conclusion that Corcoran's affidavit had been filed in bad

faith based upon the district court's finding that there were irreconcilable inconsistencies between the affidavit and the deposition testimony.

What the Fourth Circuit ignored, however, is that it matters a great deal whether it is the affidavit or, rather, the deposition testimony that is false even assuming that any irreconcilable inconsistencies exist. Sanctions were imposed based solely on the conclusion that the affidavit is false; however, if it is the deposition testimony that is false, there is no basis for sanctioning Petitioners.

Neither of the Petitioners sought the deposition testimony. Neither they nor Corcoran signed the deposition transcript. Petitioners did not file it with the district court or use it in any way in their opposition to IBM's motion for summary judgment, their subsequent motion to modify the court's order of partial summary judgment or during the trial. They referred to the deposition only in self-defense against IBM's "motion" for sanctions and then only to argue that the deposition testimony and the affidavit were not irreconcilably contradictory.

Courts are not empowered under either Rule 11 or their inherent authority to sanction an attorney for the client's evasiveness at a deposition where the attorney did not proffer the deposition testimony in evidence or rely upon it at trial. Consequently, the Fourth Circuit erred in allowing the sanctions to stand in the absence of an evidentiary hearing designed to determine conclusively whether it is the affidavit that is false rather than the deposition testimony.

It is impossible from reading the record alone to determine which testimony was true and which was

false, or whether they both stated slightly different, but non-sanctionable, versions of the truth. Unless a Court mechanically applies a presumption that a deposition is *always* more reliable than an affidavit, it is necessary to resort to extrinsic evidence before concluding whether the affidavit or the deposition is false. It is also necessary to consider extrinsic evidence to determine whether any inconsistency was "willful".

While courts generally allow a presumption that a deposition is a more reliable statement of truth, that preference does not state an irrebuttable conclusion. In *Marco Holding Co. v. Lear Siegler, Inc.*, 606 F.Supp. 204 (N.D. Ill. 1985), the Court considered a motion for sanctions where an affidavit submitted in opposition to a motion for summary judgment contradicted the affiant's prior deposition testimony. The Court followed the practice approved in *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572 (2nd Cir. 1969). "Noting that deposition testimony is usually more reliable than an affidavit statement since the deponent is at least available for cross examination, the Court [in *Perma Research*] nonetheless concluded that a Court may not exclude the affidavit from consideration to determine whether there is any issue as to any material fact." *Marco Holding, supra*, at 215. The *Marco* Court granted summary judgment but, unlike the District Court in the instant case, denied the motion for sanctions. *Id.*

IV. PRAYER

For the reasons stated herein Petitioners pray that a writ of certiorari be granted to consider the questions

presented. Alternatively, Petitioners pray that the instant Petition be withheld pending this Court's decision in *Cooter & Gell, supra.*

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2101

JAMES CORCORAN,

Plaintiff-Appellant,

and

SECURITY SOFTWARE OF NEW JERSEY, INC.; SECURITY SOFTWARE OF MARLTON, INC.,

Plaintiffs,

versus

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellee.

No. 88-2102

JAMES CORCORAN,

Plaintiff-Appellant,

and

PETER F. FALTINGS; SECURITY SOFTWARE OF NEW JERSEY, INC.; SECURITY SOFTWARE OF MARLTON, INC.,

Plaintiffs,

versus

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellee.

No. 88-2103

EDWARD A. McCONWELL;
CLAYTON E. DICKEY, Plaintiffs-Appellants,

and

PETER F. FALTINGS;
SECURITY SOFTWARE OF NEW JERSEY, INC.;
SECURITY SOFTWARE OF MARLTON, INC.;
JAMES CORCORAN, Plaintiffs,

versus

INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, District Judge. (CA-86-1193-A)

Argued: December 5, 1988 Decided: January 30, 1990

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

Kenneth C. Bass, III (John S. Buckley, VENABLE, BAETJER & HOWARD, on brief); Harvey B. Cohen (R. Scott Caulkins, COHEN, GETTINGS, ALPER & DUNHAM, on brief) for Appellants. Paul C. Saunders (Richard W. Clary, Brian S. Fraser, Thomas M. Finnegan, CRAVATH, SWAINE & MOORE; Haynie S. Trotter, McGUIRE, WOODS, BATTLE & BOOTHE, on brief) for Appellee.

PER CURIAM:

This case presents a consolidated appeal by plaintiffs-appellants James Corcoran and his attorneys, Edward McConwell and Clayton Dickey, against whom sanctions totalling $57,581.19 were assessed by the district court. These sanctions resulted from Corcoran's irreconcilably inconsistent statements made in a deposition and contemporaneous affidavit. For the reasons set forth below, we affirm the imposition of sanctions but remand the cause to the district court for an amendment of the amount of the assessment consistent with this opinion.

I.

In October 1986, plaintiffs Security Software of New Jersey, Inc. and Security Software of Marlton, Inc. (both franchisees of Entre Computer Center; hereafter "Security Software), a retailer of personal computers, Peter Faltings, and James Corcoran[1] filed a lawsuit against International Business Machines Corporation (hereafter "IBM") alleging breach of contract, tortious interference with contract, and conspiracy. The plaintiffs contended, *inter alia*, that IBM supplied an inadequate number of computers and wrongfully terminated them as a dealer of IBM products. On May 29, 1987, the jury returned a verdict in favor of IBM.

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[1] Faltings and Corcoran were dismissed as plaintiffs. Such dismissal was affirmed by this court. *See Faltings v. International Business Machines*, No. 87-1123 (4th Cir. Aug. 4, 1988) (unpublished per curiam).

The motion for sanctions at issue on appeal here stems from an affidavit filed by Corcoran, an officer and owner of a fifty percent share of Security Software, in connection with plaintiffs' opposition to a motion for summary judgment filed by IBM. Included as a supporting document was an unsworn and unsigned Corcoran affidavit with Corcoran's name typed on the signature line next to an "/S/", suggesting the existence of a sworn copy. Subsequently, while taking Corcoran's deposition, IBM's counsel received a copy of the plaintiffs' opposition. At that time, Corcoran admitted that he did not write the affidavit, had not signed it, and that he had been unable to read the telecopied draft he had received in its entirety.

Following Corcoran's deposition, IBM served plaintiffs' counsel by hand with the Reply Memorandum in Support of its Motion for Summary Judgment. In the reply, IBM pointed out the inconsistencies to be found between Corcoran's affidavit and deposition testimony. Despite such notice, plaintiffs' counsel filed an executed version of the original affidavit immediately before the district court heard oral argument on the motion for summary judgment.

The court granted IBM's motion with regard to several of plaintiffs' causes of action. Thereafter, the plaintiffs filed a motion to modify the order for partial summary judgment, again relying on the Corcoran affidavit. At that time the district court noted the apparent inconsistencies to be found between Corcoran's affidavit and deposition, yet set the cause for trial, where a verdict in favor of IBM was rendered. IBM then filed a Motion for Sanctions for Filing a False Affidavit. Plaintiffs opposed the motion on

the grounds that the affidavit was not false and that while Corcoran's deposition testimony may be confusing, it was consistent with his affidavit. The district court, however, found several discrepancies in the following passages. Corcoran was asked in his deposition:

> Q. Do you know how many dealers IBM had as of November 1984?
>
> A. No.
>
> Q. Do you know approximately how many dealers IBM had as of November 1984?
>
> A. I may have had some idea at the time. I don't think I have now.

Corcoran's affidavit asserted that:

> By November 1984, I was aware that IBM had approximately 2,000 dealerships throughout the United States.

The affidavit continued:

> Had I known then (August 8, 1984) or learned in the next few months that IBM did not intend to supply us with enough product to meet out [sic] stores' needs we would have sold both of them.

The deposition stated:

> Q. I simply want to know whether you know as a fact sufficient to permit you to state it as a fact under oath that IBM had no intention either of approving you as a direct dealer or of supplying you products sufficient to meet your needs?
>
> A. No. I could not state that as a fact.

Again, in conflict with the deposition, the affidavit stated:

> I had no information until after November 7, 1985, that IBM knew when Malcoun made that

statement that it was shipping units to Entre in quantities sufficient to provide the Pinebrook store and, subsequently the Marlton store, with only approximately 10 units per store and that Entre was receiving a disproportionately low volume of products in comparison with others.

The deposition continued:

Q. So then it is correct, is it not, that you don't know whether or not IBM shipped computer system units to Entre in volumes that permitted Entre to ship only 10 system units per store to its franchisees in any period of time?

A. It is a belief that I have, but I am not myself in possession of nearly enough knowledge to say that is absolutely true.

Q. You have never seen any information that leads you to that belief?

A. No, I have not.

. . . .

Q. Do you have any reason to believe that Entre received computer products from IBM in disproportionately low volumes as compared to other franchisors or dealers?

A. I have an opinion about that. I am not sure if I have any proof, again.

Q. I just want to know whether you have any facts.

A. I don't have any facts. I just have a belief.

Q. You don't have any facts?

A. No.

Finally, the affidavit stated:

> Mr. Baker told us [on November 29, 1984] that IBM had not yet made its decision as to our direct purchase request.

At deposition Corcoran addressed this issue as follows:

> Q. Did he tell you during the meeting on November 29, 1984, that IBM had not yet decided on your application to become a direct purchaser?
>
> A. He may have said it that way.
>
> Q. Did he?
>
> A. I don't think I could say today exactly how he said it.
>
> Q. You wouldn't swear one way or the other what he said?
>
> A. No.

Based on such conflict, the district court held that Corcoran's affidavit had been filed in bad faith. Accordingly, sanctions totaling $57,581.19 were levied against Corcoran and his attorneys pursuant to Rules 56(g) and 11 of the Federal Rules of Civil Procedure and the inherent power of the court. *See Alyeska Pipeline Service v. Wilderness Soc.*, 421 U.S. 240, 258-59 (1975). The district court reached this figure by awarding IBM what it considered to be reasonable attorney's fees. This award included $30,293.75 for the preparation by counsel for IBM of its 20-page memorandum, which allegedly was the combined effort of six attorneys and three subordinates in

support of a motion for sanctions and a hearing.[2] This award is entitled to deference by a reviewing court and will only be overturned upon a finding of abuse of discretion. *Stevens v. Lawyers Mut. Liability Ins. Co. of N.C.*, 789 F.2d 1056, 1060 (4th Cir. 1986).

II.

We find, from the evidence of record, that imposition of sanctions in this case was well within the discretion of the district judge, as such sanctions were based on specific, supportable factual findings, and we accordingly affirm based on the district court's opinion. We do, however, take exception to the amount awarded in favor of IBM on that part of the award in connection with the motion for a hearing on sanctions.

Both Rule 56(g) and Rule 11 of the Federal Rules of Civil Procedure provide a mechanism for imposing sanctions against offending parties consisting of "reasonable

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[2] As to that portion of the award, the district court calculated as follows:

Services	Attorney	Rate	Hours	Total
9/9/87 Memorandum in	Saunders	$150	34.50	$ 5,175.00
Support of Motion for	Clary	150	6.75	1,012.50
Sanctions and Hearing	Atkins	125	33.25	4,156.25
	Baron	125	2.50	312.50
	Fraser	125	70.25	8,781.25
	Sternberg	125	42.75	5,343.75
	Grimsley	45	59.50	2,677.50
	Hafey	45	25.00	1,125.00
	Wagner	45	38.00	1,710.00
				$30,293.75

expenses" incurred in answering and challenging a false affidavit. Such reasonable expenses include attorney's fees. In determining the reasonableness of attorney's fees, this court is to consider the factors set forth in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 n. 28 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978).[3]

The issue of sanctions, though not particularly savory, is not a thorny or complicated matter of law requiring extensive research, deliberation, or tactical maneuvering. And that is true of the motion for sanctions in this case. Accordingly, we find that the exertion of 312.6 hours of attorney and paralegal time preparing a 20-page memorandum in support of such a motion was an inefficient and excessive use of manpower for which the appellant should not now be required to pay. Here, the attorneys of record for IBM are all professionals of ability; the fees they command are high. We believe that with such recognition arises a duty of reasonable efficiency in attending to legal matters. Here the time expended does not befit

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[3] These include: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

the resulting product,[4] and the allowance of $30,000 for such efforts was an abuse of discretion.

We remand to the district court to reconsider its award for the preparation of a memorandum in support of the motion for sanctions and for a hearing on such motion. Except as to this item which is remanded to the district court for further consideration, the remainder of the decision of the district court is affirmed.

AFFIRMED IN PART

AND

REMANDED WITH INSTRUCTIONS.

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[4] It is interesting to note that each page took an average of 15.6 attorney hours to prepare at a cost of $1,500 per page.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

SECURITY SOFTWARE OF NEW JERSEY, INC. *et al.*,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	NO. 86-1193-A
INTERNATIONAL BUSINESS MACHINES CORPORATION,	)	
Defendant.	)	

MEMORANDUM OPINION

The issue in this case is whether sanctions should be applied to a party and his attorneys for filing a false affidavit in opposition to a summary judgment motion.

International Business Machines Corporation ("IBM") has moved for the court to impose sanctions against the affiant James J. Corcoran ("Corcoran") and his attorneys Edward A. McConwell, Esq. and Clayton E. Dickey, Esq.

For reasons set forth below, the motion for sanctions is granted and IBM is awarded the sum $ 57,581.19 in attorneys fees and costs against James J. Corcoran, Edward A. McConwell and Clayton E. Dickey, Esq.[1]

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[1] The Court does not impose sanctions against local counsel.

I

Factual Background

Plaintiffs Security Software of New Jersey, Inc., Security Software of Marlton, Inc., Peter Faltings and James Corcoran[2] instituted this suit against IBM for breach of contract, tortious interference with contract and conspiracy.[3] Plaintiffs were franchisees for Entre Computer Centers, Inc. and in the business of selling and servicing personal computers. Plaintiffs contended *inter alia* that IBM supplied an inadequate number of computers and wrongfully terminated the plaintiffs as an IBM dealer. On May 29, 1987, the jury returned a verdict in favor of IBM. Accordingly, plaintiffs amended complaint was dismissed.

The motion for sanctions addressed in this opinion stems from an affidavit that was filed in connection with plaintiff's opposition to a motion for summary judgment filed by IBM on February 27, 1987. On March 11, 1987, plaintiffs filed an opposition to the motion with supporting documents. Included in the supporting documents was an unsworn and unsigned affidavit of James Corcoran with signature "s/" and Mr. Corcoran's name typed on the signature line suggesting a sworn copy was in existence. On March 9, 1987, Corcoran had at least two

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[2] Faltings and Corcoran were dismissed as plaintiffs on November 21, 1986. This issue has been appealed to the Fourth Circuit Court of Appeals.

[3] Other counts such as RICO were dismissed by the court on March 13, 1987.

conversations with his attorneys McConwell and Dickey concerning the affidavit.

On March 11, 1987, IBM's counsel received a copy of plaintiff's opposition while it was simultaneously taking Corcoran's deposition. At the deposition, Corcoran admitted he did not write the affidavit, had not signed it, had never seen a legible copy of it and could not read all of the draft that had been telecopied to him. (Corcoran Dep. pp. 902-905).

On March 12, 1987, IBM served plaintiffs' counsel by hand with its Reply Memorandum in Support of its Motion for Summary Judgment. This reply illuminated the inconsistencies between Mr. Corcoran's affidavit and deposition testimony. Despite having actual notice of the falsity of the unsigned affidavit, plaintiff's counsel filed an executed version of the original affidavit with the court on March 13, 1987, immediately before the court heard oral argument on the motion for summary judgment.

At the March 13, 1987, hearing, the court granted the defendant's Motion with regard to several of plaintiffs' causes of action. Plaintiffs then subsequently filed a Motion for an Order Modifying the Court's Order of Partial Summary Judgment, in which plaintiffs continued to rely on the Corcoran affidavit.

IBM has now filed its Motion for Sanctions For Filing a False Affidavit.[4] Plaintiffs oppose the Motion on the

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[4] When this issue first arose, the Court took under advisement until after trial whether further action would be appropriate.

grounds that the affidavit is not false and that IBM is playing a semantical game with Mr. Corcoran. Plaintiffs contend that while Corcoran's deposition testimony may be confusing, it is not false and is consistent with his affidavit.

This court's first inquiry is whether Mr. Corcoran's affidavit is false. The court adopts as a Finding of Fact Exhibit C of the Appendix to IBM's Memorandum In Support of its Motion For Sanctions which illustrates the various falsehoods contained in the Corcoran affidavit. The court finds it impossible to reconcile the Corcoran affidavit and deposition testimony. Either the affidavit or deposition testimony is false, regardless the court feels strongly that this is a sanctionable matter.

The court finds several discrepancies between the Corcoran deposition and affidavit. First, Mr. Corcoran was asked:

> "Q: Do you know how many dealers IBM had as of November 1984?
>
> A: No.
>
> Q: Do you know approximately how many dealers IBM had as of November 1984?
>
> A: I may have had some idea of it at the time. I don't think I have now."

These statements were made at the depositions, while the sworn affidavit stated:

> "By November 1984, I was aware that IBM had approximately 2,000 dealerships throughout the United States."

Second, the affidavit stated:

> "Had I known then [August 8, 1984] or learned in the next few months that IBM did not intend to supply us with enough product to meet out [sic] stores' needs we would have sold both of them."

The Deposition, however, stated:

> "Q: I simply want to know whether you know as a fact sufficient to permit you to state it as a fact under oath that IBM had no intention either of approving you as a direct dealer or of supplying you products sufficient to meet your needs?
>
> A: No. I could not state that as a fact."

Next, Corcoran swore in his affidavit that:

> "I had no information until after November 7, 1985, that IBM knew when Malcoun made that statement that it was shipping units to Entre in quantities sufficient to provide the Pinebrook store and, subsequently the Marlton store, with only approximately 10 units per store and that Entre was receiving a disproportionately low volume of products in comparison with others."

The sworn deposition testimony, however, was the following:

> "Q: So then it is correct, is it not, that you don't know whether or not IBM shipped computer system units to Entre in volumes that permitted Entre to ship only 10 system units per store to its franchisees in any period of time?
>
> A: It is a belief that I have, but I am not myself in possession of nearly enough knowledge to say that is absolutely true.

Q: You have never seen any information that leads you to that belief?

A: No, I have not.

. . .

Q: Do you have any reason to believe that Entre received computer products from IBM in disproportionately low volumes as compared to other franchisors or dealers?

A: I have an opinion about that. I am not sure if I have any proof, again.

Q: I just want to know whether you have any facts.

. . .

A: I don't have any facts. I just have a belief.

Q: You don't have any facts?

A: No."

Finally, the last example is the following:

AFFIDAVIT: "Mr. Baker told us [on November 29, 1984] that IBM had not yet made its decision as to our direct purchase request."

DEPOSITION: "Q: Did he tell you during the meeting on November 29, 1984, that IBM had not yet decided on your application to become a direct purchaser?

A: He may have said it that way.

Q: Did he?

A: I don't think I could say today exactly how he said it.

Q: You wouldn't swear one way or the other what he said?

A: No."

In opposition to IBM's Motion For Sanctions, plaintiffs have submitted the affidavit of Mr. Dickey and a second affidavit of Mr. Corcoran. These new affidavits purport to resolve the inconsistencies between Corcoran's original affidavit and his deposition. Nevertheless, these new affidavits are inconsistent with Corcoran's earlier deposition testimony and give rise to an independent ground for imposing sanctions.

In these new affidavits, for the first time, Corcoran and his counsel claim that he "reviewed" a draft of the affidavit in detail. Yet, two days after the allegedly detailed review, Corcoran testified under oath at his deposition that he had not read it all and that he didn't really study it because "something was the matter" with his telecopy, the draft was "a very difficult thing to read," it "had some gaps in it" and "it wasn't in studyable condition." (Corcoran Dep. pp. 903-04). The new affidavit flatly contradicts the deposition testimony. The court adopts as a finding of fact Exhibit J attached to IBM's Memorandum in Support of its Motion For Sanctions.

This court ruled on September 11, 1987, that sanctions should be imposed. The court later allowed Corcoran and the attorneys to secure personal counsel to file additional briefs. The new briefs shed no new light on this case.

II

Is Corcoran a Party?

James Corcoran argues that he is not a party and therefore not subject to Rule 56(g) or Rule 11 sanctions.

Corcoran claims that since he is a nonparty, if he has allegedly filed false affidavits, the court's only remedy against him is to refer the matter to the U.S. Attorney's office for possible prosecution for perjury.

The court finds this contention to be without merit. Corcoran is certainly no stranger to this litigation and his affidavit was obviously made with supposed knowledge of facts. Corcoran is an officer of Security Software and was a fifty percent owner. Even though the court realizes that Corcoran was dismissed as a party from this case by Judge Bryan, the dismissal has been appealed to the Fourth Circuit.

Furthermore, the docketing statement lists James Corcoran as a party in the caption of the case that was filed by plaintiffs' counsel. Subpart K of the docketing statement shows the appellant's name and includes James C. Corcoran. He is clearly a party because he was dismissed and he is appealing as a party. Nevertheless, even if he is considered a nonparty, it is still within the court's inherent power to impose sanctions. Therefore, the court rejects Corcoran's argument that this matter should be referred to the U.S. Attorney's office and finds that Mr. Corcoran is a party and subject to sanctions.

III

Sanctions

The court must next determine the appropriate sanctions to impose for filing a false affidavit.[5] Based on a

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[5] Another court has found that misrepresentations are material when designed to show disputable facts which prevent

(Continued on following page)

review of the various procedures available for sanctioning parties and attorneys, the court finds that Messrs. Corcoran, McConwell and Dickey can be subject to sanctions under Fed. R. Civ. P. 56(g), Federal Rules of Civil Procedure 11, and the inherent power of the court.

Rule 56(g)

Rule 56(g), Fed. R. Civ. P., provides:

> *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Clearly, an affidavit which is false, or, as in this case, which had not been written by, read by, or signed by the "affiant," is an affidavit "presented in bad faith." Thus, under Rule 56(g), the court may apply sanctions against the plaintiffs in the form of reasonable expenses and attorney's fees. The court may also issue an Order to the plaintiffs to show cause why they should not he held in

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(Continued from previous page)

summary judgment. *See In re Disciplinary Action Boucher,* No. 86-6591 Slip op. (9th Cir. January 21, 1988). In this recent opinion the court raised similar concerns that this Court has with the actions of the plaintiff and his counsel in this case: "The court relies on the lawyers before it to state clearly, candidly, and accurately the record as it in fact exists."

contempt of court. *Letts v. Icarian Development Co.*, No. 74 C 2252, Slip Op. at 4 (N.D. Ill. September 15, 1980) ("The filing of these false affidavits in opposition to the motion for summary judgment is the first reason for the rule to show cause why respondents should not be held in contempt, and is the ground for the Rule 56(g) motion for attorney's fees").

Rule 11

The court also has an independent rule-based justification for imposing reasonable attorney's fees and expenses on plaintiffs based on Rule 11 which the Rule provides that:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or *other paper;* that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact . . . and that it is not interposed for any improper purpose. (emphasis added).

If a paper is signed in violation of Rule 11, the court may impose a sanction on either the attorney or party who signed it, consisting of the "reasonable expenses incurred because of the pleading, motion or other paper, including a reasonable attorney's fee." At least one court has indicated that Rule 11 provides for sanctions when a false affidavit is filed. *Hutnick v. Inland Steel Co.*, No. 86 C 2567, 1987 U.S. Dist. Lexis 2462, (N.D. Ill. March 27, 1987). ("If [the party's] affidavit is indeed false, he may be subject to sanctions under Rule 11 Fed. R. Civ. P."). *See also Mercury Service, Inc. v. Allied Bank of Texas*, 117 F.R.D. 147, 159

(C.D. Cal. 1987) (Monetary sanctions can be imposed against defendant and its counsel for filing a misleading declaration, not made on personal knowledge, in support of motion to dismiss for lack of personal jurisdiction).

The case at hand is particularly egregious because of the fact that counsel filed the affidavit even though on notice that Corcoran had contradicted the affidavit in his deposition testimony. Messrs. McConwell and Dickey contend that Rule 11 may not be invoked against counsel for an affidavit not signed by counsel. Counsel argue that for Rule 11 to be invoked against them, they must have "signed" a pleading, motion or other paper in violation of the Rule. The court recognizes that lawyers are not the arbiters or the correctness of a client's sworn affidavit or deposition. Even though a lawyer is not his client's keeper, once a conflict exists between sworn deposition testimony and an affidavit, counsel should try to resolve the conflict before filing a false affidavit to defeat a motion for summary judgment.[6]

The affidavit in opposition to IBM's Motion for Sanctions exacerbates the conflict further. These actions are of such a type that a trial court cannot tolerate. To fail to sanction the attorneys and Mr. Corcoran in this instance would encourage parties and their attorneys to file false affidavits in support of or opposition to summary judgment motions. Ruling otherwise would call into question the integrity of the court proceedings on motions for

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[6] The court also finds that counsel did sign the opposition to IBM's motion for summary judgment and their own motion to modify the court's order granting partial summary judgement. Both documents relied on the Corcoran affidavit.

summary judgment. The court has a strong interest in protecting the bona fides of pleadings. Lawyers have a duty to see that false affidavits are not filed in court:

> Lawyers are officers of the court, subject to reprimand and the imposition of other disciplinary sanctions for the violations of rules to which non-lawyers are not subject. The lawyer is under a high fiduciary duty to fairly represent his client, but he owes substantial duties to the court and to the public as well. If blind loyalty to his client demands that the lawyer knowingly misrepresent facts, his duty to the court and the public requires that he not. The lawyer, as well as the judge, has the duty to the court, to the litigants in general and to the public to protect the judicial processes from those extraneous influences which impair its fairness.

Hirschkop v. Snead, 594 F.2d 356, 366 (4th Cir. 1979).

Under Rule 11, the court has discretion to impose any sanctions that are appropriate under the circumstances. *Donaldson v. Clark*, 819 F.2d 1551, 1556-57 (11th Cir. 1987) (en banc) The court can use either reprimands or monetary awards. *See* Schwarzer *Sanctions Under the New Federal Rule 11: A Closer Look*, 104 F.R.D. 181, 201 (1985).

Corcoran contends that *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829-30 (9th Cir. 1986), bars imposing sanctions under both Rule 11 and Rule 56(g). This court does not read the case in such light. First, the district court decision in *Zaldivar* that was reversed involved the dismissal of a complaint as frivolous. The case at hand involves the filing of false affidavits. Second, the language that addresses the "filing of inappropriate affidavits . . . in opposition to, motions for summary judgment should be considered under Rule 56(g), rather

than Rule 11" is only *dicta*. *Zaldivar*, 780 F.2d at 830. This case is consistent with the *Zaldivar* opinion because appropriate circumstances may exist where both Rule 11 and Rule 56(g) should apply. Here, Rule 56(g) was violated because of the bad faith submission of affidavits in a summary judgment motion and Rule 11 was violated because of the failure of counsel to make a reasonable inquiry into the factual basis of the various affidavits that were filed.

Inherent Power of the Court

Finally, it is well within the court's general power to impose sanctions in order to facilitate the efficient functioning of the judicial system.[7] Attorneys fees may be awarded when a party " . . . acted in bad faith, vexatiously or for oppressive reasons." *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 258-59 (1975). The court under its inherent power may also use its contempt power. *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1485-86 (S.D.N.Y. 1986).

More generally, the court has the inherent power to punish by contempt any falsification of judicial proceedings. The statute provides that a court shall have "the

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[7] "The Courts have the inherent power to run their business efficiently, and attorneys as officers of the court have, of course, the duty to cooperate to see that the courts are run efficiently. But the power of the court to enforce cooperation rests on the solid foundation of the inherent power to take whatever steps are necessary to enforce this cooperation." *Proceedings of the Seminar on Procedures for Effective Judicial Administration*, 29 F.R.D. 191, 409 (1961).

power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and non other, as – (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." 18 U.S.C. § 401. The courts have held that the execution and filing of false affidavits occurs in the "presence" of the court and clearly constitutes misbehavior. *In re Steiner,* 195 F. 299 (D.D.N.Y. 1912), *Ex parte Steiner,* 202 F. 419, 422 (2d Cir. 1913); *See also, Mercury Services Inc. v. Allied Bank of Texas,* 117 F.R.D. 147 (C.D. Cal. 1987) ("Sanctioning a party or its counsel for the filing of false or seriously misleading affidavits is appropriate under those inherent [contempt] powers, whether the court makes a specific contempt finding or not, to maintain the authority and dignity of the court"). Thus, the court has an independent justification, apart from Rule 56(g), and Rule 11 for issuing an order to show cause why plaintiffs should not be held in contempt.

Accordingly, the court feels that the appropriate sanction in this case would be to award IBM its attorney's fees and costs in prosecuting its motion for summary judgment and the motion for sanctions. The court believes that because the affidavit was filed in bad faith and in violation of Rule 56(g) and Rule 11, that IBM should recover its attorney's fees and costs – from the attorneys Mr. McConwell and Mr. Dickey and their client Mr. Corcoran.

IV

Attorney's Fees

This court examines several factors in deciding the appropriate amount of attorneys fees to be awarded in

this case. IBM has stated that it does not ask for all of its fees in this matter and is willing to have any sanctions awarded in this case to be paid to the Clerk of the court. At the court's direction IBM has submitted an affidavit concerning its costs and fees incurred as a result of this litigation. The court finds that the appropriate amount of attorneys fees to be awarded in the time spent which is an outgrowth of the filing of the false affidavits.

Reasonableness of Fees

In determining the reasonableness of attorney's fees, the court is guided by the factors set forth in *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n. 28 (4th Cir. 1978), *cert. denied*, 439 U.S. 934 (1978) (adopting the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). In addressing these twelve *Barber* factors, the "starting point for determining the amount of a reasonable fee is the number of hours expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

In *Daly v. Hill*, 790 F.2d 1071 (4th Cir. 1986), the Fourth circuit discussed the proper use of the *Barber* factors. The court indicated that the "critical inquiry in determining the reasonableness of a fee award is now generally recognized as the appropriate hourly rate." *Id.* at 1077. Therefore, the proper time for the consideration of the *Barber* factors is in "determining the reasonable rate and reasonable hours. A fee based upon reasonable rates and hours is presumed to be fully compensatory without producing a windfall." *Id.* at 1078. Thus, only in "exceptional circumstances" will "this presumptively fair

lodestar figure be adjusted to account for results obtained and the quality of representation." *Id.*

The Court now turns to a discussion of the *Barber* factors as they relate to the reasonableness of the hours and rate claimed by IBM.

The Lodestar

The court finds that Messrs. McConwell, Dickey and Corcoran are responsible for the attorney's fees and costs arising from the work IBM undertook in the preparation of the following three briefs and related hearings: First, IBM's March 12, 1987, Reply Memorandum in Support of its Motion for Summary Judgment. Second, IBM's April 8, 1987, Memorandum in Opposition to Plaintiff's Motion for an Order Modifying the court's order of Partial Summary Judgment. Third, IBM's Motion for Sanctions.

At the outset, the court determines the reasonable hourly rate for the attorneys. While the court realizes that counsel for IBM discounts its billing rates for the Northern Virginia area, as opposed to New York City, the court makes its own independent finding of the "prevailing market rates in the relevant community." *Blum v. Stevenson*, 465 U.S. 424, 886, 895 (1983). The court finds that the appropriate hourly rate for an attorney to practice in Northern Virginia as a senior partner in a law firm would be $150.00. Therefore, the court will award Mr. Saunders and Clary fees at the rate of $150.00 per hour. As to the associates who worked on this matter for IBM, the court finds that an appropriate rate is $125.00 per hour. Finally, as to the paralegals involved, the court finds that an appropriate award would be $45.00 per hour. Therefore, the lodestar is calculated as follows:

Services	Attorney	Rate	Hours	Total
3/12/87 Reply Memorandum	Saunders	$150	26.00	$ 3,900.00
in Support of Motion and	Clary	150	9.75	1,462.50
Hearing	Atkins	125	19.50	2,437.50
	Baron	125	10.75	1,343.75
	Fraser	125	16.50	2,062.50
	Sternberg	125	15.00	1,875.00
	Atwood	45	4.00	180.00
	Dwyer	45	10.00	450.00
	Grimsley	45	13.50	607.50
	Von Fertsel	45	32.00	1,440.00
	Wagner	45	21.00	945.00
Sub-total				16,703.75
Reduction by seventy-five percent[8]				12,557.81
Total				4,175.94
4/8/87 Memorandum in	Saunders	$150	22.00	$ 3,300.00
Opposition to Plaintiff's	Clary	150	7.00	1,050.00
Motion for an Order	Atkins	125	3.75	468.75
Modifying the Court's	Baron	125	69.00	8,625.00
Order of Partial Summary	Fraser	125	61.50	7,687.50
Judgment and Hearing	Grimsley	45	49.50	2,227.50
	Von Fertsel	45	31.00	1,395.00
	Wagner	45	27.00	1,215.00
Sub-total				25,968.75
Reduction by fifty percent[9]				12,984.37
Total				12,984.38
9/9/87 Memorandum in	Saunders	$150	34.50	$ 5,175.00
Support of Motion for	Clary	150	6.75	1,012.50
Sanctions and Hearing	Atkins	125	33.25	4,156.25
	Baron	125	2.50	312.50
	Fraser	125	70.25	8,781.25
	Sternberg	125	42.75	5,343.75
	Grimsley	45	59.50	2,677.50
	Hafey	45	25.00	1,125.00
	Wagner	45	38.00	1,710.00
				30,293.75

Services	Attorney	Rate	Hours	Total
Total for IBM Counsel:				
3/12/87			4,175.94	
4/8/87			12,984.38	
9/9/87			30,293.75	
				47,454.07
Local Counsel (2,671.00 - 400.65)[10]				2,227.35
Expenses[11]				7,899.77
Total Sanctions Award				57,581.19

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[8] IBM indicates that these hours should be reduced by one-third because not all of the time spent preparing the Reply Brief is attributable to Mr. Corcoran's affidavits. As a practical matter, IBM admits that the exact amount of time spent on that part of the reply brief and the hearing is unknown. After an examination of the brief, the Court finds that only a single page of original writing in the reply brief is devoted to the Corcoran affidavit. Therefore, the Court finds that a fair reduction of the time spent by counsel for IBM would be seventy-five percent as opposed to the one-third reduction proposed by IBM. Therefore, the award is adjusted accordingly.

[9] The Court reduces this amount for the same reasons the time spent by IBM on 3/12/87 the Reply Brief was reduced. The hours are only reduced by fifty percent because the plaintiffs continued to rely on the Corcoran affidavit despite knowing of its problems.

[10] Fees for local counsel were reduced by fifteen percent because the affidavit in support of the fee petition failed to designate which attorneys undertook which tasks.

[11] Expenses include the following costs associated with the three briefs and hearings: travel, computerized legal research, federal express and duplicating.

2. The Novelty and Difficulty of the Questions Raised

This case involves sanctions of a party and his counsel for filing false affidavits in support of an opposition to a Motion for Summary Judgment and an opposition for sanctions. The issue raised in this sanction award is clearly not one the court enjoys adjudicating, however, behavior such as this cannot be allowed to pass. Nevertheless, the work was not particularly novel or difficult so no adjustment is necessary for this factor.

3. The Skill Required to Properly Perform the Legal Services Rendered

Counsel for IBM were successful in having sanctions awarded against counsel and his client for filing a false affidavit. They skillfully represented their clients. No adjustment is necessary.

4. The Attorney's Opportunity Costs in Pressing Instant Litigation

No evidence was offered as to this factor, but obviously IBM's counsel were acting as officers of the court by bringing to the court's attention this serious matter which must be remedied.

5. Customary Fee for Like Work

Given the entire context of this matter, and after careful review of the fee petition submitted by counsel for IBM and the responses of Corcoran and his attorney, the court has reduced the amounts claimed to fees that the court believes are appropriate.

6. The Attorney's Expectations at the Outset of the Litigation

This factor is not pertinent to this matter.

7. The Time Limitations Imposed by the Client or Circumstances

This factor is not pertinent to this matter.

8. The Amount in Controversy and the Results Obtained

The real controversy involved in this matter is to uphold the dignity of the court's processes.

9. The Experience, Reputation and Ability of the Attorney

Messrs. Saunders and Clary who participated in this trial, skillfully represented their client. Mr. Trotter's ability is well known to the court. No adjustment is necessary.

10. The Undesirability of the Case Within the Legal Community in Which the Suit Arose

Obviously a lawyer requesting a court to impose sanctions on another lawyer makes this case somewhat undesirable. However, counsel for IBM does a great service to the court by acting as an officer of the court and exposing this behavior.

11. The Nature and Length of the Professional Relationship Between Attorney and Client

No evidence was offered as to this factor.

12. Attorney's Fee Awards in Similar Cases

The court has not had an occasion to make a similar award but it has awarded counsel fees in line with the rates awarded in this case. Accordingly, no adjustment is therefore necessary.

An appropriate Order shall issue.

Dated: March 28, 1988
Alexandria, Virginia

/s/ James C. Cacheris
United States
District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

SECURITY SOFTWARE OF NEW JERSEY, INC., *et al.*, Plaintiffs, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.	)	CIVIL ACTION NO. 86-1193-A

ORDER
(Filed March 28, 1988)

In accordance with the accompanying Memorandum Opinion it is accordingly ORDERED:

(1) that Judgment is ENTERED in favor of IBM in the sum of $57,581.19 in counsel fees and costs and against James J. Corcoran, Edward A. McConwell, and Clayton E. Dickey, jointly and severally.

(2) that the Clerk shall forward copies of this Order together with the accompanying Memorandum Opinion to all counsel of record.

Dated: March 28, 1988
Alexandria, Virginia

/s/ James C. Cacheris
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2101

JAMES CORCORAN

Plaintiff-Appellant

and

SECURITY SOFTWARE OF NEW JERSEY, INC.; SECURITY SOFTWARE OF MARLTON, INC.

Plaintiffs

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

Defendant-Appellee

No. 88-2101

JAMES CORCORAN

Plaintiff-Appellant

and

PETER F. FALTINGS; SECURITY SOFTWARE OF NEW JERSEY, INC.; SECURITY SOFTWARE OF MARLTON, INC.

Plaintiffs

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

Defendant-Appellee

No. 88-2103

EDWARD A. MCCONWELL; CLAYTON E. DICKEY

Plaintiff-Appellant

and

PETER F. FALTINGS; SECURITY SOFTWARE OF NEW JERSEY, INC.; SECURITY SOFTWARE OF MARLTON, INC.; JAMES CORCORAN

Plaintiffs

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

Defendant-Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc
(Filed March 13, 1990)

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell with the concurrence of Judge Widener and Judge Hall.

For the Court,

JOHN M. GREACEN
CLERK

No. 89-1960

IN THE
Supreme Court Of The United States
October Term 1989

EDWARD A. McCONWELL, and
CLAYTON E. DICKEY,

Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Attorneys for Respondent
International Business
Machines Corporation

July 16, 1990.

QUESTIONS PRESENTED

1. Whether this Court should follow its recent decision in *Cooter & Gell v. Hartmarx Corp.*, 58 U.S.L.W. 4764 (June 11, 1990) (No. 89-275), in which the Court decided the same question presented by Petitioners in a way contrary to that urged by Petitioners here.

2. Whether attorneys may be sanctioned under Rule 11 and the inherent power of the court for (1) filing their client's affidavit after being put on notice that their client had contradicted and denied personal knowledge of material assertions in that affidavit in deposition testimony, (2) relying on that affidavit in two briefs that they signed and submitted to the court and (3) submitting additional affidavits containing further inconsistencies in an effort to avoid sanctions.

3. Whether Petitioners have been denied "due process" where the issue of sanctions was addressed at six hearings before the district court, Petitioners and their client filed 180 pages of briefs and seven affidavits in the district court and where Petitioners were afforded, but declined, the opportunity to present live testimony.

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No. 89-1960

IN THE

Supreme Court Of The United States

October Term 1989

EDWARD A. McCONWELL, and
CLAYTON E. DICKEY,

Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners Edward A. McConwell and Clayton E. Dickey are attorneys who represented two corporate plaintiffs, Security Software of New Jersey, Inc. ("Security Software") and Security Software of Marlton, Inc., and two individual plaintiffs, Peter F. Faltings and James J. Corcoran, in litigation against International Business Machines Corporation ("IBM") brought in the Eastern District of Virginia. That litigation arose from IBM's decision to terminate Security Software's Personal Computer Retail Dealer Contract because Security Software was engaged in making a very large number of "grey market" sales of IBM personal computers, *i.e.*, sales to unauthorized computer dealers, in violation of the contract.

The four plaintiffs each asserted claims against IBM for breach of contract, fraud, conspiracy to injure plaintiffs' business in violation of the Virginia Conspiracy Statute, violation of the New Jersey Franchise Practices Act, violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and tortious interference with contract. Plaintiffs sought $43 million in damages, not including the possibility of treble damages both under RICO and the Virginia Conspiracy Statute.

In the course of that litigation, IBM filed a motion for summary judgment seeking dismissal of all claims. That motion was granted with regard to a number of the claims, a directed verdict in IBM's favor was granted on some claims, and IBM subsequently prevailed before a jury on all of the remaining claims. The conduct that led the district court to impose sanctions against Petitioners occurred in the course of their opposition to IBM's motion for summary judgment, in a subsequent motion filed by them seeking modification of the court's order granting partial summary judgment and in their subsequent attempts to avoid sanctions.

Although Petitioners attempt to create the impression that they were sanctioned simply for filing an unexecuted affidavit with the Court, in fact the district court imposed sanctions on Petitioners and Mr. Corcoran, and the Fourth Circuit affirmed that decision, because Petitioners

> (1) filed an unexecuted affidavit of their client, James "C." Corcoran,[1] in the district court that had been drafted by one of the Petitioners and that was not based, as Petitioners concede (*see* Petition at 5), on the witness' personal knowledge;
>
> (2) procured and filed an executed version of that affidavit in an effort to oppose IBM's motion for summary judgment a day after they were put on notice that, in his deposition, the witness had contradicted certain

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[1] Mr. Corcoran's middle initial is "J."

key assertions in the affidavit, assertions that were material to the court's consideration of IBM's motion for summary judgment, and disclaimed any personal knowledge of other key facts asserted in the affidavit;

(3) relied on the affidavit in two briefs that they signed and filed with the court; and

(4) in an effort to avoid sanctions, procured and filed additional affidavits that were inconsistent with the prior testimony but which failed to explain the inconsistencies.

The district court afforded Petitioners and Mr. Corcoran (who has not petitioned for a writ of certiorari) a number of hearings on the issue and more than ample opportunity to explain the inconsistencies. (*See* J.A. at 276.)

On March 28, 1988, the district court issued a written opinion[2] imposing sanctions of $57,581.19, holding that the Corcoran affidavit and deposition testimony were irreconcilable (D. Ct. Op. at 14a), that new affidavits submitted by Petitioners and Mr. Corcoran in opposition to the motion for sanctions contained further unexplained inconsistencies (D. Ct. Op. at 17a), and that the conduct at issue was sanctionable under Rules 11 and 56(g) of the Federal Rules of Civil Procedure and the inherent power of the court to punish bad faith conduct, as recognized in *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975) and other cases (D. Ct. Op. at 18a-24a).

The Fourth Circuit affirmed the district court's decision to impose sanctions but reversed in part the lower court's determination of the amount of the sanctions and remanded for further proceedings. (Ct. App. Op. at 10a.) The Petition

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[2] The district court's opinion below is appended to the Petition beginning at page 11a, and will be referred to in citations herein as "D. Ct. Op.". The opinion of the court of appeals is appended to the Petition beginning at page 1a, and will be referred to in citations herein as "Ct. App. Op.".

for a Writ of Certiorari was filed after the court of appeals decision but before any proceedings in the district court on remand.

ARGUMENT

I.

THIS CASE DOES NOT PRESENT ANY QUESTION WORTHY OF REVIEW BY THIS COURT.

No question of broad application or wide-ranging importance is presented here, and the Petition does not meet the criteria for granting the Writ as set forth in Rule 10 of the Rules of this Court.

In holding that the appropriate standard of review of the decision to impose sanctions was the abuse-of-discretion standard, the Fourth Circuit applied the correct standard. In *Cooter & Gell v. Hartmarx Corp.*, 58 U.S.L.W. 4863 (U.S. June 11, 1990) (No. 89-275), this Court held that the abuse-of-discretion standard is the appropriate standard. *Id.* at 4769. Thus, the first ground asserted by Petitioners is moot.

The other questions presented are entirely fact-based, are not in conflict with any other court of appeals decision, and a decision by this Court would not offer any substantial guidance to, or resolve any conflicts between, the lower courts. Nor do Petitioners contend that the Fourth Circuit has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10(a).

Each of the questions presented by Petitioners is briefly discussed below.

II.

THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD OF REVIEW IN AFFIRMING THE DISTRICT COURT'S IMPOSITION OF SANCTIONS.

In *Cooter & Gell v. Hartmarx Corp.*, 58 U.S.L.W. 4763 (U.S. June 11, 1990) (No. 89-275), the Court held that

> "Rule 11's policy goals also support adopting an abuse-of-discretion standard. The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation." 58 U.S.L.W. at 4768.

The Court concluded that "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination". *Id.* at 4769.

Here, the Fourth Circuit applied the appropriate abuse-of-discretion standard:

> "We find, from the evidence of record, that imposition of sanctions in this case was well within the discretion of the district judge, as such sanctions were based on specific, supportable factual findings, and we accordingly affirm based on the district court's opinion." (Ct. App. Op. at 8a.)

Its decision is entirely consistent with this Court's ruling in *Cooter & Gell*. *See* 58 U.S.L.W. at 4769.

III.

PETITIONERS WERE SANCTIONED UNDER THE INHERENT POWER OF THE COURT AS WELL AS UNDER RULE 11, AND IN ANY EVENT SUCH SANCTIONS WERE APPROPRIATE UNDER RULE 11.

Petitioners contend that they could not, as a matter of law, be sanctioned under Rule 11 because they did not sign the offending affidavit and that

> "[t]he Fourth Circuit apparently affirmed the sanctions solely in reliance on Rule 11 since the only authority cited by the Fourth Circuit in support of its affirmance was its decision in *Stevens v. Lawyers Mut. Liability Ins. Co.*, 789 F.2d 1056 (4th Cir. 1986), which dealt exclusively with Rule 11." (Petition at 19.)

Petitioners' statement is at best misleading. The Fourth Circuit cited the *Stevens* case solely for the proposition that an

> "award [of sanctions] is entitled to deference by a reviewing court and will only be overturned upon a finding of abuse of discretion." (Ct. App. Op. at 8a.)

There is no basis for concluding that the standard of review is any different for an award of sanctions under the inherent power of the court than it is under Rule 11. Thus, the Fourth Circuit's reliance on the *Stevens* case does not support Petitioner's assertion that the court affirmed the sanctions solely on the basis of Rule 11, and in fact it did not.

The Fourth Circuit expressly recognized that "sanctions totaling $57,581.19 were levied against Corcoran and his attorneys pursuant to Rules 56(g) and 11 of the Federal Rules of Civil Procedure *and the inherent power of the Court*" (Ct. App. Op. at 7a; emphasis added), and stated that "we . . . affirm *based on the district court's opinion*" (*id.* at 8a; emphasis added). Thus, there is no question that the Fourth Circuit affirmed the district court's decision imposing sanctions on *all* bases set forth in its opinion.

In any event, Petitioners are properly subject to sanctions under Rule 11 for signing and filing two briefs in the district court that relied upon the offending affidavit. Each of the two Petitioners signed one of those briefs, and this Court's decision in *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989) does not in any way call into question the district court's decision even if it had been based solely on Rule 11.

IV.

THE RECORD REFLECTS THAT PETITIONERS WERE AFFORDED MORE THAN AMPLE OPPORTUNITY "TO BE HEARD" AND WERE NOT DEPRIVED OF "DUE PROCESS".

The imposition of sanctions must comply with the due process requirements of notice and an opportunity to be heard. Here, Petitioners were afforded more than adequate notice (which they do not contest) and numerous opportunities to be heard. The question of sanctions was addressed before the district court at hearings on March 13, 1987, April 10, 1987, September 11, 1987, October 9, 1987, November 6, 1987, and April 29, 1988, and Petitioners and Mr. Corcoran filed 180 pages of briefs and seven affidavits with the district court. (*See, e.g.*, J.A. at 6-9, 64-67, 88-94, 134-62, 179-87, 221-30, 267-78.) For tactical reasons, Petitioners and their client chose not to testify at the hearing on September 11, 1987, even though they had ample notice and a full opportunity to do so. Indeed, they waited until after the district court indicated its intention to award sanctions, and after full briefing, the filing of affidavits and oral argument, to request an "evidentiary hearing". (*See* J.A. at 225.)

In any event, Petitioners have never explained how an "evidentiary hearing" would have benefited them, since the essential facts found and relied upon by the court below are undisputed and indisputable. All the relevant facts are contained in Mr. Corcoran's deposition testimony, the affidavits

filed subsequent to that deposition, and the briefs and transcripts of the hearings on the motions for summary judgment and for sanctions.[3]

Petitioners argue that a trial was necessary to determine which was false, the deposition testimony or the affidavit. They assert that if the deposition testimony was false, there is no basis for sanctions since they did not rely on the deposition. (Petition at 25.) However, as the district court properly held, once a clear conflict exists between a client's sworn deposition testimony and his affidavit, counsel must attempt to resolve the conflict before filing and relying upon the affidavit to defeat a motion for summary judgment. (D. Ct. Op. at 21a.) Not referred to in the Petition is the fact that the district court imposed sanctions in part because Petitioner Dickey and Mr. Corcoran filed additional affidavits in connection with the sanctions question that contained further unexplained inconsistencies with earlier deposition testimony. (*See id* at 17a, 21a.)

Moreover, regardless whether the Corcoran affidavit was literally and objectively "true", Petitioners have conceded all along that it was not based on Mr. Corcoran's personal knowledge. (*See, e.g.*, J.A. at 111-14.) At his deposition, he disclaimed knowledge of the "facts" set forth in his "affidavit", which he stated he had never written nor read completely. (*See, e.g.*, J.A. at 29, 38, 51-54.) Counsel not only drafted the affidavit, but after the affiant disclaimed knowledge under oath in his deposition, they had their client execute it, filed it

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[3] The district court was also highly familiar with both the issues and the litigants, especially since the same court had presided over a trial in a case brought by these same plaintiffs, represented by these same attorneys, against a different defendant raising similar issues only a short time before their case against IBM was commenced. *See Faltings, et al., v. Entre Computer Centers of America, Inc., et al.*, No. 86-256-A (E.D. Va.). As the Advisory Committee Notes to Rule 11 observed,

> "[i]n many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary." Fed. R. Civ. P. 11 advisory committee's notes (1983 amend.).

with the court and twice relied upon it in signed briefs. Under the circumstances, sanctions were not only appropriate they were required. *E.g.*, *Letts v. Icarian Dev. Co.*, No. 74 C 2252, slip op. at 9 (N.D. Ill. Sept. 15, 1980) (LEXIS, Genfed library, Dist file).

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

July 16, 1990.

Respectfully submitted,

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